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Citizenship and Immigration Services

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ADMINISTRATIVE APPEALS OFFICE
CIS, AAO, 2014 ss, 3/F
E. Street, N.W.
Washington, D.C. 20536

FEB 06 2004

File: WAC 02 136 52291 Office: CALIFORNIA SERVICE CENTER

Date:

IN RE: Petitioner:
Beneficiary:

Petition: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of Citizenship and Immigration Services (CIS) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of \$110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann
Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office on appeal. The appeal will be dismissed.

The petitioner is a bus company. It seeks to employ the beneficiary permanently in the United States as its operations manager. As required by statute, the petition is accompanied by a Form ETA 750 Application for Alien Employment Certification approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition.

On appeal, counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's continuing ability to pay the wage offered beginning on the priority date, the day the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). Here, the request for labor certification was accepted on June 16, 1998. The proffered salary as stated on the labor certification is \$2,651.14 per month, which equals \$31,813.68 per year.

With the petition counsel submitted copies of the petitioner's nominal 1998 and 1999 Form 1120 U.S. corporation income tax return. Those returns state that the petitioner reports pursuant

to a fiscal year ending September 30th of each year. The nominal 1998 return shows that during the fiscal year ending September 30, 1999, the petitioner declared a taxable income of \$61,978.

The nominal 1999 return, for the fiscal year ending September 30, 2000, shows that the petitioner declared a loss of \$55,459 as its taxable income before net operating loss deduction and special deductions that year. The associated Schedule L shows that at the end of the fiscal year, the petitioner's current liabilities exceeded its current assets.

Because the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, the California Service Center, on May 6, 2002, requested additional evidence pertinent to that ability. Specifically, the Service Center requested evidence of the petitioner's ability to pay during 2000 and 2001. The Service Center also noted that the evidence submitted pertinent to the petitioner's 1998 and 1999 fiscal years did not indicate that the petitioner was able to pay the proffered wage.

The Service Center also noted the petitioner had claimed, on Part B of the Form ETA 750, that it was currently employing the beneficiary. The Service Center asked the petitioner to provide copies of the beneficiary's Form W-2 wage and tax statements beginning with the 1998 W-2 form.

In response, counsel submitted copies of its Form DE-6 employer's quarterly wage reports for all four quarters of 2001. Those forms indicate that the petitioner paid the beneficiary \$13,975 during that year. Counsel provided the beneficiary's 2001 W-2 form verifying that amount and a 2000 W-2 form showing that the petitioner paid the beneficiary \$11,700 during that year. Counsel also provided a letter from the president of the petitioning corporation stating that prior to 2000, the petitioner paid the beneficiary's wages in cash.

Counsel also provided the 1998, 1999, 2000 and 2001 Form 1040 joint income tax return of the beneficiary and his spouse.

The 1998 return shows that the beneficiary declared an adjusted gross income of \$10,873 during that year. That return does not state the source of the beneficiary's income during that year.

The 1999 return shows that the beneficiary declared an adjusted gross income of \$10,873 during that year. That return does not state the source of the beneficiary's income during that year.

The 2000 return shows that the beneficiary, consistent with the information on the W-2 form submitted, declared an adjusted gross income of \$11,700.

The 2001 return shows that the beneficiary, consistent with the information on the W-2 form submitted, declared an adjusted gross income of \$13,975.

The director determined that the evidence submitted did not establish that the petitioner had the ability to pay the proffered wage and, on August 30, 2002, denied the petition.

On appeal, counsel submits copies of the petitioner's 2000 Form 1120 U.S. corporation income tax return. That return shows that, during the fiscal year ending September 30, 2001, the petitioner declared a loss of \$198,995 as its taxable income before net operating loss deduction and special deductions. The corresponding Schedule L states that, at the end of that fiscal year, the petitioner's current liabilities exceeded its current assets.

Counsel argues that the director's decision ignores that the beneficiary worked for the petitioner since before 1998, even though the beneficiary provided copies of his tax returns. Counsel also stresses the amount of the petitioner's gross receipts and the amount of the wages and salaries it paid during the various salient years in arguing that the petitioner has shown the ability to pay the proffered wage.

Counsel provided W-2 forms showing that the petitioner paid \$11,700 and \$13,975 to the beneficiary during 2000 and 2001, respectively. Because the petitioner has demonstrated that it paid those amounts to the beneficiary during those years, it must demonstrate only the ability to pay the balance of the proffered wage out of its income and assets during those years, rather than the entire amount of the proffered wage. However, the petitioner's wages as stated on those W-2 forms are annual amounts based on a calendar year. The petitioner's tax returns are based on a fiscal year ending on September 30. The amounts shown on those W-2 forms must be apportioned to the fiscal years during which they were paid. This calculation is explained further below.

Counsel also submitted a statement by the petitioner's president that it employed the beneficiary during 1998 and 1999 as well, implying that at least some of the income the beneficiary declared during those years was paid to him by the petitioner. However, counsel submitted no documentary evidence of this assertion. An unsupported statement is insufficient to sustain the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner's president's implied assertion that some or all of the petitioner's income during 1998 and 1999 was paid by the petitioner is insufficient reason to include any portion of those amounts in the calculation of the petitioner's ability to pay the proffered wage.

In determining the petitioner's ability to pay the proffered wage, CIS will first examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by both CIS and judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held the INS, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *K.C.P. Food Co., Inc. v. Sava*, *Supra.* at 1084. The court specifically rejected the argument that INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. at 537. See also *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. at 1054.

The priority date of the petitioner is June 16, 1998. That date fell within the petitioner's 1997 fiscal year. Therefore, the petitioner was obliged to show the ability to pay the proffered wage during its 1997 fiscal year and each ensuing year. Because the Service Center did not request that the petitioner submit evidence pertinent to its 1997 fiscal year, however, this decision shall not be based on the petitioner's failure to show the ability to pay the proffered wage during its 1997 fiscal year.

The proffered wage is \$31,813.68 per year. During its 1998 fiscal year the petitioner declared a taxable income before net operating loss deduction and special deductions of \$61,978. The petitioner has demonstrated that it was able to pay the proffered wage during fiscal year 1998.

During fiscal year 1999, the petitioner declared a loss of \$55,459 as its taxable income before net operating loss deduction and special deductions and ended the year with negative net current assets. The petitioner has not demonstrated that it was able to pay the proffered wage during fiscal year 1999.

The W-2 forms show that during the 2000 and 2001 calendar years, the petitioner paid the beneficiary \$11,700 and \$13,975, respectively. Because the petitioner reports on a fiscal year ending September 30, only approximately one-quarter of the amount paid during 2000 was paid during the petitioner's 2000 fiscal

year and the remaining three-quarters paid during the petitioner's 2001 fiscal year. Similarly, of the amount shown on the beneficiary's 2001 W-2 form, only approximately one-quarter was paid during the petitioner's 2001 fiscal year and the remaining three quarters paid during the 2002 fiscal year. Thus, the petitioner has demonstrated that it paid the beneficiary approximately one-quarter of \$11,700 during its 2000 fiscal year, or \$2,925. The petitioner has demonstrated that it paid three-quarters of \$11,700 and one-quarter of \$13,973.75 to the beneficiary during its 2001 fiscal year, for a sum of \$12,268.75. Finally, the petitioner has demonstrated that it paid three-quarters of \$13,975, or \$10,481.75, during its fiscal year 2002.

The petitioner has demonstrated that it paid the beneficiary approximately \$2,925 during its 2000 fiscal year and is obliged to demonstrate that it was also able to pay \$28,888.68, the balance of the proffered wage, during that fiscal year. During fiscal year 2000, the petitioner declared a loss of \$198,995 as its taxable income before net operating loss deduction and special deductions and finished the fiscal year with negative net current assets. The petitioner has not shown the ability to pay the balance of the proffered wage during its fiscal year 2000.

The petitioner has demonstrated that it paid the beneficiary approximately \$12,268.75 during its 2001 fiscal year. The petitioner is obliged to show the ability to pay \$19,544.93, the balance of the proffered wage, during that fiscal year. Counsel submitted no financial information pertinent to the petitioner's 2001 fiscal year, although the Service Center requested evidence to show the ability to pay the proffered wage during 2001, part of which occurs during the petitioner's 2001 fiscal year. However, as the information was requested at a time when the petitioner's fiscal year 2001 tax return was unavailable, this decision shall not rely upon the failure to demonstrate the ability to pay the proffered wage during fiscal 2001.

The petitioner failed to submit sufficient evidence that the petitioner had the ability to pay the proffered wage during its 1999 and 2000 fiscal years. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.